Supreme Court, U.S.
FILED
MAY 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMPANIA DE DESARROLLO COOPERATIVO,
Petitioner,

v.

USI PROPERTIES, CORP.
MD CONSTRUCTION, INC.,
Respondents

PETITIONERS REPLY BRIEF

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May 8, 1989

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TO THE HONORABLE COURT:

NOW COMES PETITIONER, COMPAÑIA DE DESARROLLO COOPERATIVO, and respectfully submits its Reply Brief to Respondent's Opposition to the Petition for a Writ of Certiorari:

I. ARGUMENT

On April 24, 1989 respondent, MD Construction, Inc. filed a Brief in Opposition to the Petition for a Writ of Certiorari. The following arguments merit discussion in a Reply Brief:

1. At pages twelve (12) and thirteen (13) of the Opposition Respondent argues that USI did not need

to "conspire with MD in order to have access to the Federal Court", because "diversity of citizenship exists without the October 26th agreement". This is a fallacious argument for various reasons. First, MD and CDC have the same citizenship so MD could not have filed a case against CDC in Federal Court. Second, USI could certainly file a case against MD in Federal Court because USI is a New York corporation and MD is a Puertorican corporation. But after the October 1983 agreement USI had no need to file such a case. Third, the real question is whether USI could have filed a case based on diversity jurisdiction *against CDC alone*. In this regard it is important to remember that the First Circuit acknowledged that in a case commenced by USI "as plaintiff and CDC as the sole defendant, MD would undisputably have been found to be an indispensable party under both R.19 A(1) and A(2)". 860 F 2d 1, 5 N. 1 (1st Cir. 1988). Since MD would necessarily have been joined as a party in such a suit the problem is whether it would have been aligned as a plaintiff or as a defendant. Petitioner submits that the agreement of October 26, 1983 requires that in such an eventuality MD be aligned as a plaintiff. This is so because USI and MD's interests coincide completely, particularly with regard to the *only controversy* to be litigated in Federal Court, that is: Who was liable for breach of contract in the Ciudad Cristiana Agreements.[1]

Finally, the point is not whether diversity of jurisdiction existed *without* the October 26, 1983 agree-

[1] MD's debt to USI would not even be involved in a case by USI against CDC alone because USI would not have filed a Complaint against MD. So, if MD agrees with USI about CDC's liability pursuant to the 1983 agreement it would have to be aligned as a plaintiff together with USI and against CDC.

ment, but whether diversity jurisdiction existed *after* the October 1983 Agreement and prior to the filing of the complaint. Whatever genuine controversy existed between USI and MD before October 26, 1983 was eliminated by the agreement. After that date and before the filing of the complaint by USI no complete diversity jurisdiction existed in this case.

2. At pages sixteen (16) and seventeen (17) MD argues that USI needed a judgment against MD so that "it could if necessary, collect on such judgment" against MD. This is also a fallacious argument. This Court in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 73 n. 3 (1941) rejected a similar argument by noting that Chase did not bring the suit in order to obtain a judgment against the gas company, because that was not really "in issue". In this case, it is ludicrous to suggest that after the agreement of October 26, 1983 USI brought this suit in Federal Court to obtain a judicial finding of MD's liability. The "issue" of MD's liability was eliminated by the agreement between USI and MD. Whatever "need for a judgment" USI may have had it was certainly not a "controversy" that justified aligning USI and MD on opposite sides.

MD's reliance on the case of *Fidelity & Deposit v. Sheboygan Falls*, 713 F. 2d 1261 (7th Cir. 1983) is completely misplaced.. MD argues that in *Fidelity* the Court noted that the plaintiff "really did want a judgment" against codefendant Scotty, so that realignment of Scotty was not proper. 713 F. 2d to at 1267. But that point was made by the Seventh Circuit because there was nothing to suggest that at the time of the filing of the complaint Fidelity, the plaintiff, and Scotty the defendant had reached an agreement

resolving all their differences. Indeed, the Court stated that if Fidelity knew "when it filed its complaint that Scotty [the codefendant] would in effect confess liability under the indemnity agreement", then there would be no actual substantial controversy between them "that would justify placing them on opposite sides of the lawsuit". 713 F. 2d 1266 - 1267. Of course, the Seventh Circuit was speculating on the real situation of the parties prior to the filing of the Complaint. In that case there was no written agreement between the parties. In this case, the October 26, 1983 agreement clearly demonstrates that USI *knew* that MD's answer to the complaint would admit liability to USI. So it is clear that under the principles expounded by the Seventh Circuit in *Fidelity*, MD would have been realigned as a plaintiff in this case.

In short, all the Circuit Courts that have considered the issue of realignment, in the cases cited in the Petition for a Writ of Certiorari, pages 12 - 13, would have clearly realigned MD as a plaintiff in this case. Nobody, neither the Courts involved nor Respondent, have been able to say or describe what was the *controversy* between USI and MD at the time of the filing of the complaint. The reality is that there was no controversy whatsoever.

This Court has made no pronouncements on realignment doctrine since the case of *City of Indianapolis* in 1941. In the 1980's decade the realignment doctrine has produced several important Circuit Court decisions. A conflict has now developed between the Circuits. It is time for this Court to reaffirm the viability of realignment doctrine and to clarify the content and scope of the doctrine.

II. CONCLUSION

For the foregoing reasons, it is respectfully requested from this Honorable Court that it grant this Petition for Writ of Certiorari to the Court of Appeals for the First Circuit.

In San Juan, Puerto Rico, this May 5, 1989.

RESPECTFULLY SUBMITTED.

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